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No. 98-1704

In the
# Supreme Court of the United States

AMERICAN AIRLINES, INC.

*Petitioner,*

v.

ROBERT H. TICE, ET AL.

*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## REPLY BRIEF OF PETITIONER

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## REPLY BRIEF OF PETITIONER

American Airlines, Inc. ("American") petitions this Court to grant certiorari to address the conflicting legal standards applied to issue and claim preclusion in the Federal Circuits, especially with respect to repetitive litigation by related, identically situated plaintiffs. Respondents fail to rebut American's showing that there is a significant conflict in the courts of appeals with respect to preclusion that should be resolved by this Court.

### I. THE OPPOSITION IGNORES THE CONFLICTING LEGAL STANDARDS EMPLOYED BY THE FEDERAL CIRCUITS TO DETERMINE CLAIM OR ISSUE PRECLUSION.

American showed in its petition that different circuits use quite different legal tests to decide whether claim or issue preclusion is appropriate. Pet. at 10-12. For example, some circuits, including the Seventh Circuit, apply a very narrow

and restrictive test under which preclusion will *never* be found appropriate except in cases involving traditional privity or prior class certification. Pet. App. 13a. Thus, in those circuits, the doctrine of "virtual representation" is limited to circumstances involving traditional privity or a certified class.[1] Other circuits, including the Eighth Circuit, apply a much broader and less restrictive test under which preclusion *may* be found appropriate even in cases that do *not* involve traditional privity or prior class certification. *Tyus v. Schoemehl*, 93 F.3d 449, 454 (8th Cir. 1996), *cert. denied*, 520 U.S. 1166 (1997).

The opposition utterly fails to come to grips with that showing. Without even discussing the different *legal* tests used by different circuits, the opposition makes two irrelevant points in arguing that there is no conflict. First, the opposition emphasizes that the cases petitioner cites as being in conflict did not all arise under the ADEA or the FLSA. Opp. at 6. But that does not show there is no conflict. It simply shows that the conflict about how to resolve

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[1] The Seventh Circuit's decision in *Monfils v. Taylor*, 165 F.3d 511 (7th Cir. 1998) (*see* Opp. at 7) *petition for cert. filed*, 67 U.S.L.W. 3684 (U.S. Apr. 28, 1999) (No. 98-1744) is completely consistent with the narrow view of virtual representation prescribed by the Seventh Circuit in this and earlier cases. Indeed, *Monfils* expressly cited the court's earlier decision in this case with approval, noting that "the theory of 'virtual representation' has serious limitations." 165 F.3d at 521. (The limitations, as noted, are that the doctrine only applies in cases of traditional privity or prior class certification). Moreover, *Monfils* repeatedly emphasized that "Taylor [the precluded party] and the City were in privity." *Id.* *Monfils* simply reaffirmed the Seventh Circuit's view that preclusion *can* apply in cases where parties are in traditional privity. In that case, the precluded party had been a party to the underlying litigation, and the City's liability was entirely derivative of the jury's determination that the precluded party had violated the constitutional rights of the plaintiffs' decedent. *Id.* at 519. Moreover, the City was required by statute to indemnify the precluded party for any damage award against him.

preclusion issues is having an impact in a broad range of cases, not just in cases arising under the ADEA or the FLSA. Indeed, the breadth of the circumstances in which different circuits apply different preclusion tests underscores the certworthy nature of this issue.[2]

Second, the opposition argues that the different *results* in the cases petitioner cites as being in conflict can be explained by the differing and "unique" *facts* of those cases. Opp. at 7-10. But the detail that different cases involve different facts does not undercut American's showing that different circuits would use different legal tests to resolve cases involving the *same* facts. Indeed, the essence of the legal conflict between the circuits is that some circuits will only *consider* a narrow range of circumstances -- *i.e.*, whether there is traditional privity or prior class certification -- whereas other circuits will consider a much broader range of circumstances, and may decide, based on that broader range of circumstances, that preclusion is appropriate even in cases that do not involve traditional privity or prior class certification. Thus, cases not involving traditional privity or prior class

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[2] To the extent respondents' distinction between ADEA cases and other types of claims is based on their view that the ADEA itself provides a specific rule with respect to preclusion in 29 U.S.C. § 216(b), their reliance on the statute is misplaced. Section 216(b) expressly provides a right of action to employees to sue for lost wages and liquidated damages, and in that context, provides only that employees are not party plaintiffs to any such action unless they consent in writing. Thus, Congress ensured that one employee could not litigate the money damages owed to another employee without written consent. The provision does not purport to provide a preclusion rule, and does not. Nor does it limit the effect of litigation on non-party employees in any other way. The EEOC may litigate an employee's rights without consent. And any injunctive relief obtained, in an agency or private suit, governs the employment conditions of current and future employees, without their consent. *See* 29 U.S.C. § 217; *Baker v. Delta Air Lines, Inc.*, 6 F.3d 632 (9th Cir. 1993).

certification would be decided differently in different circuits, even if their facts were not distinguishable.

Accordingly, respondents have not even questioned, much less rebutted, American's showing, and the Eighth Circuit's explicit observation, that federal courts are "sharply divided" regarding the broad or narrow scope of the doctrine of virtual representation.[3] Certiorari is appropriate to resolve this sharp division among the circuits.

## II. THE OPPOSITION DOES NOT REBUT AMERICAN'S SHOWING THAT, UNDER THE PRECLUSION DOCTRINE APPLIED BY THE EIGHTH AND OTHER CIRCUITS, PRECLUSION WOULD BE APPROPRIATE HERE.

Preclusion is appropriate because of the extremely close relationship between this case and previous cases in which the legality of American's "training seat" policy has already been resolved in American's favor against challenges from pilots or the EEOC on their behalf. For example, the plaintiffs here, as those in *Johnson*,[4] challenge precisely the same "training seat" policy in order to assert identical contractual rights under the very same collective bargaining agreement. Both seek to use the same accrued seniority under the very same collective bargaining agreement to bid for the third seat in the cockpit. The obstacle for both, as for every other challenger to American's "training seat" policy, is that American's requirements for the third seat have been consistently found

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[3] *Tyus*, 93 F.3d at 454.

[4] *Johnson v. American Airlines, Inc.*, 745 F.2d 988 (5th Cir. 1984), *cert. denied*, 472 U.S. 1027 (1985).

to be a *bona fide* occupational qualification.[5]

Indeed, the *Johnson* plaintiffs brought their claim of intentional violation of the ADEA not only for themselves but for "all others similarly situated." *Johnson v. American Airlines, Inc.*, 487 F. Supp. 1343, 1343 (N.D. Tex. 1980).[6] The *Johnson* plaintiffs sought a full range of relief that, if granted, would have eliminated the practice respondents challenge here. The *Johnson* plaintiffs expressly requested that American be enjoined from reserving the third seat as a training seat by enforcing its requirements for that position. If that case had been decided against American, *all* of its pilots, including respondents, would have been able to bid down to the third seat.

Even respondents grudgingly concede that, if American's policy had been found to violate the ADEA, a court providing relief "may . . . have entered a remedial order ultimately benefitting other pilots." Opp. at 9. In fact, it is well settled

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[5] Respondents attempt to confuse the question by arguing that the challenges from those wishing to be hired from the outside for a third seat position are somehow different from challenges by current employees wishing to bid down for a third seat position. The challenges, however, are identical. In each case, the challengers complained that American's policy limiting the third seat position to pilots young enough to progress from it to captain, and to serve as a captain for a reasonable period before reaching the FAA-mandated age limit, violated the ADEA. In each case, American successfully persuaded the trier of fact that the age requirement was a *bona fide* occupational qualification, because the third seat was used as a training position, and therefore could lawfully be denied to those too old to qualify. Thus, American's training seat policy has previously been challenged as an ADEA violation not just once, but regularly since 1977 by an array of plaintiffs.

[6] Respondents here also proceeded for themselves and "all others similarly situated," seeking broad injunctive relief as well as personal remedies.

that the courts of the United States, adjudicating violations of federal employment discrimination statutes, have complete remedial authority and consistently exercise that authority to eliminate employment practices found to be unlawful. *See Bowe v. Colgate Palmolive Co.*, 489 F.2d 896 (7th Cir. 1973) (expressly adopting a judicial policy of providing broad injunctive relief in discrimination cases); *Rosen v. Public Serv. Elec. & Gas Co.*, 477 F.2d 90, 95-96 (3d Cir. 1973) (following *Bowe*'s policy that injunctive relief in discrimination cases "should be broadly read and applied"); *see also Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975) (holding that the district court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar similar discrimination in the future) (citations omitted).

Thus, if the *Johnson* plaintiffs -- or any other challengers to American's training seat policy -- had won their claim, the trial court would have accordingly enjoined American's third seat requirements. There would then have been no basis for the *Tice* plaintiffs to have sued at all, because they would not have been subjected to those requirements.

Respondents' vague argument that there are changed circumstances here is meritless. *See* Opp. at 15. Respondents do not identify any changes in American's third seat policies or practices since any of the earlier plaintiffs failed to demonstrate that its employment requirements violated the ADEA, nor could they. Respondents' further allusion to scientific and medical advances as changed circumstances is simply odd. Such advances might provide a basis for challenging the FAA's mandatory retirement age, but that is not the rule challenged here and not a rule over which American has any control. In any event, no scientific

or medical advances have eliminated the need to train future captains to fly passengers safely.

## III. RESPONDENTS DO NOT REBUT AMERICAN'S SHOWING THAT THE PRECLUSIVE EFFECT OF GOVERNMENT ENFORCEMENT ACTIONS IS AN IMPORTANT AND UNRESOLVED ISSUE THAT THIS COURT SHOULD ADDRESS.

This case would be an appropriate vehicle to consider the impact of prior government enforcement actions on subsequent private actions. Respondents do not dispute that the federal government, intervening on behalf of some individuals affected by American's third seat policy, lost that challenge on the merits of its claim that American's policy violated the ADEA. *See Murnane v. American Airlines, Inc.*, 482 F. Supp. 135 (D.D.C. 1979), *aff'd*, 667 F.2d 98 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982). Nor do they dispute that the EEOC was found to be collaterally estopped from making a second challenge under the same provisions of the ADEA to that same policy when it attempted to enforce that statute on behalf of *other* individuals affected by American's policy. *See EEOC v. American Airlines, Inc.*, 48 F.3d 164, 169 (5th Cir. 1995). The question presented by this case is whether still other individuals affected by that policy should be free to relitigate that same issue, when the EEOC would *not* be permitted to relitigate the question on their behalf.

Respondents' reliance on the statutory provisions to argue that subsequent private litigation of the same issue is not precluded stretches those provisions beyond recognition and requires results contrary to Congress' express intentions. Sections 216(b), (c) and 626(b), (c) simply empower the implementing federal agency to bring actions on behalf of employees for money damages, to collect those damages and

then to pay them to the employees. The provisions do not address the question of preclusion, directly or indirectly.

The provisions that respondents attempt to rely on do, however, establish a priority between government and private enforcement suits by providing that when an agency does commence a suit on behalf of specific employees, the employees lose their rights to sue on their own behalf. *See* 29 U.S.C. §§ 216(b), (c); 626(b), (c). Congress could, of course, have avoided the burden of duplicate suits by allowing the first filed suit to take precedence, or even more simply, by precluding duplicate remedies. Instead, Congress made clear that the agency is its preferred plaintiff by providing that, regardless of timing, the agency suit always takes precedence, and that when the agency files, the private plaintiff loses not merely a duplicate remedy but the right of action itself.

The result under respondents' reading of these provisions turns Congress' expressly established preference on its head. Under that reading, the agency is estopped from relitigating the same issue in subsequent litigation brought on behalf of different employees, but those different employees are not estopped. Thus, respondents' reading places employees in a better position to enforce the anti-discrimination provisions than the agency, and would result in private employees displacing the agency as the primary enforcement agent, instead of the other way around. That clearly was not Congress' intention, as Congress expressly designated the agency as its preferred plaintiff.[7]

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[7]Indeed, Congress' preference for agency enforcement is further made clear by its empowering the agency to enforce the ADEA in the absence of any employee complaints. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28, (1991) ("the EEOC's role in combating age discrimination is not dependent on the filing of a charge").

The narrow approach to the doctrine of both claim and issue preclusion applied below imposes substantial burdens on judicial resources and on defendants who are repeatedly subjected to the considerable costs of litigation over questions which have been fully aired and determined. As this Court recognized in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971), repetitive litigation is a form of harassment that can achieve through the imposition of litigation costs what it cannot achieve by the application of law. The litigation here, brought by members of the same employment group who are bound by the same employment contract, is exactly the type of repetitive litigation that should be subject to issue or claim preclusion. Under the jurisprudence of several Federal Circuits, such litigation would be precluded. But under the decision below and other Circuits adopting the same view, preclusion is not available. Nothing in the opposition undercuts the importance of resolving this question.

## CONCLUSION

For the reasons stated above, this Court should grant American's petition and reverse the decision of the Seventh Circuit.

Respectfully submitted,

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